

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LINDA WALLACE,)	
)	
Plaintiff)	
)	
v.)	Civil No. 96-344-P-C
)	
JOHN J. CALLAHAN,)	
Acting Commissioner of Social Security,¹)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION²

This Supplemental Security Income (“SSI”) and Social Security Disability (“SSD”) appeal raises the issues of whether the Commissioner erred in determining that the plaintiff’s impairments do not prevent her from performing her past relevant work and whether the hypothetical questions posed to the vocational expert were fatally deficient. I recommend that the court remand the case for further proceedings.

¹ Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security John J. Callahan is substituted as the defendant in this matter.

² This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Acting Commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on June 23, 1997 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity at any time relevant to the decision, Finding 2, Record p. 22; that she suffers from back pain and obesity, impairments which are severe but which do not meet or equal any of those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 22; that her statements concerning her impairments and their impact on her ability to work are not supported by objective medical findings, Finding 4, Record p. 22; that she has the residual functional capacity for a full range of light work, "compromised by her alleged back pain," Finding 5, Record p. 22; that her impairments do not prevent her from performing her past relevant work, Finding 8, Record p. 23; that, in the alternative, she is able to make a successful adjustment to work as a cashier II and a school bus monitor, Finding 9, Record p. 23; and that, therefore, she was not under a disability at any time prior to the Administrative Law Judge's decision on December 7, 1995, Finding 10, Record p. 23. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final decision of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff bases her primary attack on the unfavorable decision of the Administrative Law Judge on two Social Security Rulings effective July 2, 1996.³ The decision in this case was issued on December 7, 1995. The plaintiff contends that the Rulings are nonetheless applicable to this case, and require remand, because the first clarifies existing law, rather than setting forth new law, and because the second states policy as to existing requirements for assessing residual functional capacity. Itemized Statement of Errors (Docket No. 3) at 3, 5. She cites no authority for this argument.

Social Security Rulings are binding on the Social Security Administration and may be “relied upon as precedent until they are either expressly superseded, modified, or revoked by later legislation, regulations, court decisions or rulings.” *Lauer v. Brown*, 818 F.2d 636, 640 (7th Cir, 1987). Thus, the administrative law judge in this case was bound by the existing rulings at the time of his decision. Contrary to the plaintiff’s argument, issuance of a new ruling after a decision has been entered does not require a remand for evaluation of the evidence under the “new” standard, even when the new ruling is expressly retroactive to a date before the alleged onset of the claimant’s disability. *Howell v. Sullivan*, 950 F.2d 343, 347-8 & n.1 (7th Cir. 1991). *See also Koolstra v. Sullivan*, 744 F. Supp. 243, 247 (D. Colo. 1990) (Social Security case may not be reopened due to change in administrative ruling). The rulings upon which the plaintiff seeks to rely are not retroactive. However, counsel for the commissioner conceded at oral argument that rulings effective

³ The two Rulings are 96-7p, “Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual’s Statements,” which superseded Ruling 95-5p, “Considering Allegations of Pain and Other Symptoms in Residual Functional Capacity and Individualized Functional Assessments and Explaining Conclusions Reached,” and 96-8p, “Assessing Residual Functional Capacity in Initial Claims,” which are reprinted in 52 *West’s Social Security Reporting Service* at Ru 26- 41 (1997). Neither Ruling states that it has any retroactive effect.

before the decision of the Appeals Council is issued are applicable to cases pending before the Council. The Appeals Council decision in this case was issued October 9, 1996. Record at 3. Therefore, the two rulings do apply to the plaintiff's claim.

The decision states only that "there is very little objective medical evidence to support" the plaintiff's claims of pain, *id.* at 21, and that "[t]he claimant's statements concerning her impairments and their impact on her ability to work are not supported by the objective medical findings," *id.* at 22. Ruling 96-7p states, *inter alia*, that "[a]n individual's statements about the intensity and persistence of pain or other symptoms or about the effect the symptoms have on his or her ability to work may not be disregarded solely because they are not substantiated by objective medical evidence." 52 West's Social Security Reporting Service at Ru 26. Even more telling is the directive that "It is not sufficient for the adjudicator to make a single, conclusory statement that 'the individual's allegations have been considered' or that 'the allegations are (or are not) credible.'" *Id.* "The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." *Id.* The decision in this case does not meet this standard.

When pain is alleged, Ruling 96-8p requires the adjudicator's assessment of residual functional capacity to

- Contain a thorough discussion and analysis of the objective medical and other evidence, including the individual's complaints of pain and other symptoms and the adjudicator's personal observations, if appropriate;

- Include a resolution of any inconsistencies in the evidence as a whole; and

- Set forth a logical explanation of the effects of the symptoms, including pain, on the individual's ability to work.

Id. at Ru 40. The decision in this case is less than thorough in its discussion and analysis of the plaintiff's complaints of pain and its resolution of inconsistencies in the evidence concerning pain; it fails to set forth a logical explanation of the effects of the pain on the plaintiff's ability to work.

The plaintiff also argues that 20 C.F.R. § 404.1545(e) requires that the administrative law judge's decision set forth findings as to the specific limitations caused by the claimant's reported pain. In this regard, the commissioner argues that *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986), requires findings as to subjective complaints only if those complaints are consistent with the claimant's medical records, and that the plaintiff does not pass the "threshold" requirement for application of *Avery*.⁴ I do not read *Avery* to be so limited. The First Circuit cited with approval in *Avery* the instructions issued for the defendant's Program Operations Manual System ("POMS"), DI T00401.570, on August 1, 1985. *Id.* at 22. Those instructions provided that, in a case "where the degree of pain alleged is significantly greater than that which can be reasonably anticipated based on the objective physical findings" a further exploration was required. *Id.* at 23.

Specifically, when there is a claim of pain not supported by objective findings, the adjudicator is to "obtain detailed descriptions of daily activities by directing specific inquiries about the pain and its effects to the claimant, his/her physicians from whom medical evidence is being requested, and other third parties who would be likely to have such knowledge." Further, "it is essential to investigate all avenues presented that relate to subjective complaints. . . ."

Id. (citations omitted). The First Circuit refused to "countenance any decision by the Secretary [now the commissioner] contrary to" the POMS instructions. *Id.* at 24. The POMS language upon which the *Avery* court relied is consistent with the instructions contained in Ruling 96-8p. Particularly in

⁴ In fact, there is some objective medical evidence in the record of a possible source of back pain, as the administrative law judge noted. Record at 19-20 (x-ray showing degenerative spinal changes; muscular strain exacerbated by obesity).

a case like this, where the administrative law judge has made a finding of pain at Step 2, Record at 22, the *Avery* inquiry must still be made.

In this case, the administrative law judge asked a few questions concerning the plaintiff's daily activities, *id.* at 35-36, but the decision does not discuss even that minimal information. Neither the inquiry nor the analysis is sufficient under *Avery*.

Because the commissioner's decision is insufficient and incomplete at Step 4 of the sequential review process, I do not reach the plaintiff's argument concerning alleged errors at Step 5. I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 25th day of June, 1997.

*David M. Cohen
United States Magistrate Judge*